



December 11, 2000

Mr. Sam Haddad
Assistant General Counsel
Open Government
Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2000-4651

Dear Mr. Haddad:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 142031.

The Comptroller of Public Accounts (the "comptroller") received a request for information pertaining to telecommunications service providers that are delinquent in paying their 9-1-1 emergency service fees and surcharges. You claim that all or some of the requested information is excepted from disclosure under section 552.101 of the Government Code, in conjunction with several confidentiality statutes, and section 552.107 of the Government Code. Moreover, you state that the requested information may invoke the proprietary rights of a third party, Sprint Communications ("Sprint"). Accordingly, pursuant to section 552.305 of the Government Code, you have notified Sprint of the request for information in order to afford it an opportunity to submit objections to release of the requested information. *See Gov't Code* § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). In turn, Sprint has submitted arguments to this office, claiming that the information is excepted under section 771.061 of the Health and Safety Code and section 552.110 of the Government Code. We have considered both Sprint's and the Comptroller's arguments and have reviewed the submitted representative sample of the information at issue.¹

¹We assume that the "representative sample" of records submitted to this office is truly representative of all of the information at issue. *See Open Records Decision Nos. 499 (1988), 497 (1988)*. This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than those submitted to this office.

We begin our analysis by characterizing the submitted information. The submitted information appears to pertain to the comptroller's audit of Sprint in regard to Sprint's collection and remittance of certain fees and surcharges associated with providing 9-1-1 emergency service. See Health & Safety Code §§ 771.071, .072 (providing for the imposition of 9-1-1 emergency service fees and surcharges to be collected by service providers from their customers), .073(g) (requiring 9-1-1 emergency service providers to remit such fees and surcharges to the Commission on State Emergency Communications), .076(a) (authorizing the Commission on State Emergency Communications to ask the comptroller to conduct an audit on a service provider in regard to that service provider's collection and disbursement of fees and surcharges). Apparently, the comptroller is not only authorized to conduct audits in regard to the collection and disbursement of such fees and surcharges, but it is also responsible for collecting past due amounts. Health & Safety Code § 771.077. Therefore, we gather that the comptroller maintains the submitted information in regard to its audit of Sprint and in regard to its collection of past due fees owed by Sprint.

The comptroller takes the position that all or some of the submitted information is or may be confidential under section 552.101 of the Government Code in conjunction with section 111.006 of the Tax Code. Section 552.101 excepts from required public disclosure "information that is confidential by law, either constitutional, statutory, or by judicial decision." Accordingly, section 552.101 encompasses confidentiality provisions such as section 111.006(a)(2) of the Tax Code. Section 111.006(a)(2) provides that information "secured, derived, or obtained by the Comptroller or the attorney general during the course of an examination of the taxpayer's books, records, papers, officers, or employees, including an examination of the business affairs, operations, source of income, profits, losses, or expenditures of the taxpayer" is confidential. Tax Code § 111.006(a)(2). Although the comptroller does not explain why any provision in chapter 111 of the Tax Code should apply to the comptroller's auditing and collection of fees and charges contemplated by chapter 771 of the Health and Safety Code, we believe that this question is answered by section 111.0021 of the Tax Code. That provision reads: "This chapter also applies to a tax or fee that the comptroller is required to collect under a law not included in this title." Tax. Code § 111.0021. Therefore, we believe that section 111.006(a)(2) of the Tax Code applies to audits and collections conducted by the comptroller pursuant to chapter 771 of the Health and Safety Code. Consequently, we find that most of the submitted information is confidential under section 111.006(a)(2). However, we note that the starting and ending dates of tax audits are not confidential. *A & T Consultants, Inc. v. Sharp*, 904 S.W.2d 668 (Tex. 1995). Moreover, the fact that an audit resulted in a deficiency assessment or a refund warrant is also not confidential. *Id.* We have marked the information that the comptroller must withhold under section 111.006(a)(2) as encompassed by section 552.101 of the Government Code.

In regard to the information that is not confidential under section 111.006, we turn to Sprint's and the comptroller's argument that the information is confidential under section 771.061 of the Health and Safety Code. That statute provides in relevant part:

(a) Information that a service provider of telecommunications service is required to furnish to a governmental entity in providing computerized 9-1-1 service is confidential and is not available for public inspection. . . .

(b) Information that a service provider of telecommunications service furnishes to the commission or an emergency communication district to verify or audit emergency service fees or surcharge remittances and that includes access line or market share information of an individual service provider is confidential and not available for public inspection.

Health & Safety Code § 771.061. The remaining submitted information was not furnished by Sprint to any governmental entity. Therefore, section 771.061 does not apply to the remaining information. Accordingly, the comptroller may not withhold the remaining information under section 771.061 as encompassed by section 552.101.

Sprint also argues that the information is excepted under section 552.110. Generally, section 552.110 protects trade secrets and certain types of commercial or financial information. As the remaining information does not consist of information generated or furnished by Sprint, we find that it does not contain the type of information protected under section 552.110. *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Therefore, the comptroller may not withhold the remaining information under section 552.110.

Finally, we turn to the comptroller's argument regarding section 552.107 of the Government Code. Section 552.107(1) of the Government Code excepts from disclosure information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107(1) protects them only to the extent that such communications reveal the attorney's legal opinion or advice. Open Records Decision No. 574 at 3 (1990). In addition, basically factual communications from attorney to client, or between attorneys representing the client, are not protected. *Id.*

Although the comptroller has not specified which information it believes is excepted under section 552.107, we assume that it refers to a legal memorandum. This memorandum does not appear to contain legal advice rendered to the comptroller on its behalf, nor does it appear to contain confidential information of the comptroller's that would pertain to the rendering of legal advice. Based on our review of the memorandum, and the absence of any argument from the comptroller, we find that the comptroller may not withhold the memorandum under section 552.107.

In conclusion, the comptroller must withhold most of the submitted information under section 552.101 in conjunction with section 111.006 of the Tax Code. However, the comptroller must release the remaining submitted information. We have marked the information accordingly.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "Kay Hastings".

Kay Hastings
Assistant Attorney General
Open Records Division

KH\EJF\er

Ref: ID# 142031

Encl: Marked documents

cc: Mr. Russell Gold
The Wall Street Journal
1005 Congress, Suite 800
Austin, Texas 78701
(w/o enclosures)